A

KAMSINAH KARIM

v.

ACP KAMARUDIN A AZIZ
(PENGERUSI LEMBAGA TATATERTIB
B **POLIS JOHOR) & ORS**

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[JUDICIAL REVIEW NO: 25-54-2010]
C 9 FEBRUARY 2012

CIVIL PROCEDURE: *Certiorari - Application for - Dismissal of police constable from police force - Application to quash decision of dismissal - Rules of the High Court 1980, O. 53 - Police constable*
D *charged with drug offence - Dangerous Drugs Act 1952, s. 15(1)(a) - Charge dismissed with caution - Criminal Procedure Code, s. 173A(2)(a) - Dismissal from public service on ground of conviction of drug offence - Public Officers (Conduct and Discipline) Regulations 1993, ss. 33(1), 38 - Whether applicant entitled to be summarily dismissed without reasonable*
E *opportunity to be heard - Whether dismissal valid and proportionate to misconduct*

CONSTITUTIONAL LAW: *Public servants - Dismissal of police constable from police force - Right to be heard - Police constable charged with drug offence - Dangerous Drugs Act 1952, s. 15(1)(a) - Charge*
F *dismissed with caution - Criminal Procedure Code, s. 173A(2)(a) - Dismissal from public service on ground of conviction of drug offence - Public Officers (Conduct and Discipline) Regulations 1993, ss. 33(1), 38 - Whether right to be heard as public servant breached - Federal Constitution, arts. 5, 8 and 135*

G

CRIMINAL PROCEDURE: *Charge - Dismissal of charge with caution - Whether could be construed as conviction - Whether dismissal void for unreasonableness and not proportionate to misconduct - Interpretation of order of Magistrate in dismissing charge with caution -*
H *Whether to mean "conviction" - Strict requirements of summary trials - Whether complied with - Criminal Procedure Code, s. 173*

POLICE: *Disciplinary proceedings - Dismissal - Dismissal of police constable from Royal Malaysian Police force - Police constable charged with drug offence - Dangerous Drugs Act 1952, s. 15(1)(a) - Charge*
I *dismissed with caution - Whether could be construed as conviction - Criminal Procedure Code, s. 173A(2)(a) - Dismissal from public service on ground of conviction of drug offence - Public Officers (Conduct and Discipline) Regulations 1993, ss. 33(1), 38*

The applicant, a police constable, sought for a *certiorari* order pursuant to O. 53 of the Rules of the High Court 1980 ('RHC') to quash the decision of the respondents in dismissing her from the Royal Malaysian Police Force. The applicant was charged in the Magistrate's Court for self-administration of drugs, an offence under s. 15(1)(a) of the Dangerous Drugs Act 1952 ('DDA') but the charge was later dismissed with caution pursuant to s. 173A(2)(a) of the Criminal Procedure Code ('CPC'). However, the Chief Police Officer of Johor suspended the applicant's service on the ground that she was convicted of the said offence. The applicant was later dismissed from the police force pursuant to ss. 33(1) and 38 of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'). The issues that arose before the court were: (i) whether the applicant was entitled to be summarily dismissed under ss. 33(1) and 38(g) of the Regulations without being given a reasonable opportunity to be heard; and (ii) whether the dismissal was void for unreasonableness under the *Wednesbury* principles and not proportionate to the misconduct found to have been committed by the applicant. The respondents contended that the order of the Magistrate in dismissing the charge against the applicant with caution could be construed as a "conviction" under regs. 2, 29 and 33 of the Regulations. The respondents relied heavily on the principles laid down in *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Awam & Anor ('Tan Tek Seng')*. On the other hand, the applicant argued that the order of the Magistrate was defective and flawed as it was not in compliant with the strict requirements of summary trials under s. 173 of the CPC. The applicant further argued that *Tan Tek Seng* should be distinguished from the instant case as in that case, there was a clear finding that the charge was proven or a clear finding of guilt resulting in the offence being proved.

Held (allowing application with costs):

(1) The Magistrate had failed to satisfy the condition precedent laid down in s. 173A(2) of the CPC before making the order under s. 173A(2)(a) which was to find that the charge was proved. Unless the Magistrate made a clear and affirmative finding of guilt, it was wrong for him to proceed to the next step of exercising his powers under s. 173A of the CPC. It could not be gainsaid that a finding that the prosecution had proven its case beyond reasonable doubt must precede a finding of guilt. (paras 11 & 12)

(2) The issue in the instant case was patently different from that of *Tan Tek Seng* as there was completely absent from the record, a finding of guilt or that the charge had been proven. As the appellant's case did not fall within the principle of *Tan Tek Seng*, the applicant did not lose her constitutional right to be heard entrenched under art. 135(2) of the Federal Constitution ('FC'). The second respondent's application of s. 33(1) of the Regulations was wrong in law and principle as the applicant was not entitled to be summarily dismissed without being given a reasonable opportunity of being heard principally on the ground that there was no record of the criminal charge against her. The applicant's dismissal from the public service had to be declared null and void. An order of *certiorari* ought to be issued to quash the decision of the second respondent. (paras 14, 17 & 18)

(3) Applying established principles to the facts of the case, the court could not substitute its own decision for the substantive findings of the second respondent on the merits on the grounds of unreasonableness or unfairness. The decision of the second respondent might involve underlying policy considerations not known to the court. In the circumstances, the question of proportionality or excessiveness of the penalty would not arise. (para 27)

Case(s) referred to:

Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Thakur v. Union of India AIR [1987] SC 2386 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

T Ganeswaran v. Suruhanjaya Polis Diraja Malaysia & Satu Lagi [2005] 3 CLJ 302 CA ***(refd)***

Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 173(c), (m)(iii), 173A(1), (2)(a)

Dangerous Drugs Act 1952, s. 15(1)(a)

Federal Constitution, art. 135(2)

Rules of the High Court 1980, O. 53

Public Officers (Conduct and Discipline) Regulations 1993, regs. 3, 29(2), 33(1), 38(g)

For the applicant - Subramaniam Nair (Elina Zubir with him); M/s Maniam Nair & Co
For the respondents - Shamsul Bolhassan; SFC

Reported by Najib Tamby

JUDGMENT

Gunalan Muniandy JC:

Introduction

[1] By this originating summons, the applicant ('A') seeks for an order of *certiorari* to quash the decision of the 1st and 2nd respondent on behalf of 3rd respondent in dismissing the applicant (Lance Corporal) from Royal Malaysian Police Force with effect from 21 August 2009. This application is made pursuant to O. 53 Rules of the High Court 1980.

Brief Chronology

[2] I adopt the salient facts as set out in A's submission as follows:

(a) 1 October 1998 : Applicant joined the Police Force as Constable;

(b) 1 July 1999 : Applicant posted to Pontian Police Station;

(c) 12 July 2006 : Applicant was interdicted from duty;

(d) Thereafter she was charged in Pontian Magistrate's Court under s. 15(1)(a) DDA 1952 case No. 82-2-2006;

(e) 5 August 2009, Applicant received a letter dated 3 August 2009 together with the "Minit Tercerai" from disciplinary authority which states that they have completed the investigation in respect of disciplinary misconduct and the disciplinary authority has decided that there was no misconduct by the applicant. As such, the disciplinary file was closed/NFA (No further action). (Please refer exh. "KK1" in encl. 3).

(f) 21 August 2009 : Applicant was dismissed from the charge with caution pursuant to s. 173A(2)(a) CPC by Pontian Magistrate;

A (g) 24 September 2009 : Chief Police Officer, Johor suspended the applicant's service with effect from 21 August 2009 on the ground that the applicant was convicted by Pontian Magistrate Court for an offence under s. 15(1)(a) ADB 1952 pursuant to s. 173 CPC;

B (h) 21 June 2010 : The first respondent informed the applicant that she was dismissed from the police force with effect from 21 August 2009 pursuant to s. 33(1) and s. 38 Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations').

C **[3] Issues For Determination**

(a) Whether the applicant was entitled to be summarily dismissed under s. 33(1) and s. 38(g) Public Officers (Conduct and Discipline) Regulations 1993 without being given a reasonable
D opportunity of being heard?"

(b) Whether the dismissal is void for unreasonableness under the *Wednesbury* principles and not proportionate to the misconduct found to have been committed by the applicant?

E **First Issue**

[4] The answer to this issue depends entirely on whether 'a crucial charge has been proved against' the applicant ('A'). This is by virtue of art. 135 of the Federal Constitution which provides:

F
> No member of such service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this Clause shall not apply to the following
> G cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him.

H **[5]** In the present case before the Magistrate's Court, A was charged for self administration of drugs under s. 15 of the Dangerous Drugs Act 1952. A pleaded not guilty and claimed trial.

[6] In the present case A was charged at the Pontian Magistrate's
I Court for self-administration of drugs ('methamphetamine') under s. 15(1)(a), Dangerous Drugs Act, 1952. She pleaded not guilty and claimed trial. The decision of Magistrate after a trial

conducted under s. 173(c) of the Criminal Procedure Code ('CPC') was to dismiss the charge against A with caution under s. 173A(2)(a) of the CPC. At the conclusion of the trial the learned Magistrate proceeded straight to make the order without recording any finding of guilt against A. His order reads as follows:

> ... Orang Yang Tertuduh Dilepaskan Dengan Amaran di bawah Sek 173A(2)(a) Kanun Prosedur Jenayah ...

[7] The learned Senior Federal Counsel ('SFC') for the respondent contended that the order of the Magistrate dismissing the charge against A with caution as above could be construed as a "conviction" under regs. 2, 29 and 33 of the Regulations. He relied heavily on the principles laid down in the Court of Appeal case of *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 where it was held in affirming the High Court decision as follows:

> The word appearing in proviso (a) of art. 135(2) of the Federal Constitution is "proved" and not "convicted". In a case where a binding over is made under s. 173A CPC, there must first be a plea or a finding of guilt resulting in the offence being proved as per the said proviso (a) of art. 135(2). In the circumstances, the learned Judicial Commissioner was correct in upholding the finding of guilt made by the Sessions Court. It follows that the protection afforded by art. 135 had been lost to the appellant, and so, the learned Judge, Johor Bahru High Court, was also correct in holding that the appellant was not entitled to a hearing before his dismissal herein.

[8] Learned counsel for A contended that *Tan Tek Seng* should be distinguished from the instant case as in that case there was a clear finding that the charge was proved or a clear finding of guilt resulting in the offence being proved. Therefore, that the right of a public servant to an opportunity to be heard may be lost by operation of para (a), proviso to art. 135(2). The situation in the present case was clearly distinguishable as a finding as above was absent from the court's record.

[9] A's contention was, basically, that the order of the Magistrate was defective and flawed for not complying with the strict requirements of summary trials under s. 173 of the CPC. This section sets out the procedure that magistrates must observe in criminal trials. In the present case, it was clear that the Magistrate found a *prima facie* case against A at the close of the

prosecution's case and correctly proceeded to hear evidence from her. However, what he did at the conclusion of the trial, ie, after the defence had completed its case was the subject of serious dispute. The correct procedure that has to be followed at this stage of the trial under s. 173 is this:

> 173. The following procedure shall be observed by Magistrates in summary trials:
>
> (m) (i) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (ii) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it and the Court shall pass sentence according to law.
>
> (iii) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[10] Yet, the learned Magistrate in this case made none of the findings in (ii) and (iii) above which are mandatory requirements. Instead, he proceeded straight to hear pleas in mitigation and record an order dismissing the charge with caution under s. 173A(2)(a) of the CPC. The learned SFC contended that the disciplinary authority was right in construing this order as a conviction under regs. 3, 29 and 33 of the Regulations. The material part of s. 173A reads:

> 173A. (1) Notwithstanding anything contained in section 173, the Court shall have the powers contained in this section.
>
> (2) When any person is charged before the Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release

the offender on probation, the Court may, without proceeding to record a conviction, make an order either:

(a) dismissing the charge or complaint after an admonition or a caution to the offender as to the Court seems fit, or

[11] Hence, it is manifestly clear that the learned Magistrate had failed to satisfy this condition precedent laid down in s. 173A(2) before making the order under s. 173A(2)(a) which is to find that the charge is proved. Granted that s. 173A(2) envisages a situation where the charge against the offender has been proved before the court takes into consideration the mitigating factors like character, antecedents, age, etc. for it to make any of the orders in (a) and (b). However, the learned Magistrate had failed to take the most important step stipulated therein, ie, to find that the charge had been proved before proceeding further to sentence A according to law.

[12] The learned SFC in effect submitted that as the Magistrate had not made any order of acquittal under s. 173(m)(iii), CPC which can only be made upon finding that the prosecution has not proved its case beyond reasonable doubt it can be presumed that he had made a finding of guilt against A. It is my view that in a case of this nature involving the termination of a public servant and its far-reaching effects, the law must be interpreted strictly in resolving the current dispute and there is no room for a liberal interpretation prejudicial to the rights of the subject. It is to be noted that in a criminal case the record is all important as regards the findings made by a court trying a case. Where there is ambiguity or vagueness as to the order or decision actually made, it should be resolved in favour of the aggrieved person, ie, the applicant in our case.

[13] As contended by A, the question in this case is not whether the court has to record a conviction under s. 173A(1) or (2) of the CPC before exercising its powers under the same section but whether the court had recorded a finding that the charge was proved which would only then be tantamount to a finding of guilt. I agree that unless the Magistrate makes a clear and affirmative finding of guilt, it was wrong for him to proceed to the next step of exercising his powers under s. 173A, CPC. It cannot be gainsaid that a finding that the prosecution has proved its case beyond reasonable doubt must precede a finding of guilt.

[14] In *Tan Tek Seng (supra)*, the issue before the court was principally whether a binding-over order under s. 173A, CPC which involves a finding of guilt but not a conviction to be recorded was sufficient for the protection under art. 135(2), FC to be lost. The Court of Appeal answered this question in the affirmative as a binding-over order made under s. 173A CPC requires a plea or a finding of guilt resulting in the offence being proved as per proviso (a) of art. 135(2). The issue in this case is patently different as there was completely absent from the record a finding of guilt or that the charge had been proved.

[15] On the failure of the disciplinary authority to appreciate that the court had not made a finding of guilt or that the charge had been proved against A, my attention was drawn to the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 AMR 1601 (Court of Appeal) where it was held that:

> ... 1(a) A tribunal, or other decision making authority, which is inferior, whether exercising a quasi-judicial function, or a purely administrative function, does not have jurisdiction to commit an error of law. It is therefore immaterial whether the error of law is jurisdictional or not, and the distinction between an error of law affecting jurisdiction and one which does not, must be discarded. An error made by such an authority results in the authority exceeding its jurisdiction. When unfair procedure is resorted to, jurisdiction is also exceeded;
>
> (b) An error of law occurs:
>
> (i) Where the decision maker asks himself the wrong question; or
>
> (ii) takes into account irrelevant considerations; or
>
> (iii) omits to take into account relevant considerations; or
>
> (iv) if he misconstrues the terms of any relevant statute, or misapplies or mis-states a general principle of law ...

[16] The above finding was fundamental to the disciplinary action taken against A pursuant to regs. 29 and 33 of the Regulations.

[17] In the above premises, as A's case did not fall within the principle of *Tan Tek Seng (supra)*, she, therefore, did not lose her constitutional right to be heard entrenched under art. 135(2), FC I accordingly, held that the 2nd respondent's application of s. 33(1) of the Regulations was wrong in law and principle. Thus,

her dismissal from the public service has to be declared null and void. In a judicial review application, the court is not concerned with the decision itself but the correctness of the decision making process is of paramount importance.

(See *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141).

[18] R2 had clearly erred in principle in its decision making process by misconstruing the decision made by the Magistrate's Court. My answer to the first and primary issue was, therefore in the negative, that A was not entitled to be summarily dismissed under regs. 33(1) and 38(g) of the Regulations without being given a reasonable opportunity of being heard principally on the ground that there was no record of the criminal charge against A having been proved. Hence, I held that an order of *certiorari* ought to be issued to quash the decision of the 2nd respondent dismissing A from the Royal Malaysian Police Force with effect from 21 August 2009.

Second Issue

[19] The issue concerns A's challenge against the severity of the penalty imposed on her as the grounds of being unreasonable and disproportionate to the alleged offence or misconduct in question. A relied heavily on the case of *Tan Tek Seng (supra)* which held, *inter alia*, that:

> ... Taking into account all the relevant factors, the order, of dismissal is too severe a punishment to impose on the appellant. In the circumstances, an order is made reducing the appellant in rank in the manner and to the extent appearing in the department's letter dated 10.04.1999 ...

[20] The Court of Appeal adopted with approval several leading Indian authorities and said this about the principle applicable by our courts:

> ... I am able to say with confidence that our Courts may safely adopt the approach taken by the Indian Supreme Court and mould it to suit our own Constitutional provision.
>
> Accordingly, the principle, that is to be distilled from the cases which I have discussed, when applied in the Malaysia context, may be stated thus. A public servant against whom a criminal charge has been proved, in the sense that I have described earlier, may or may not be dismissed solely in reliance of that

A ground. It all depends on the particular facts of each case. The relevant disciplinary authority must call for and peruse the record of the criminal proceedings and take into account all the relevant circumstances of the case, including any Departmental report or recommendation. It should then decide whether the public servant in question has committed misconduct. If it decides that he has, then it must go on to decide which of the several punishments prescribed by General Order 36 it ought to impose ...

[21] A stressed the fact that the 2nd respondent had already decided that no disciplinary misconduct had been committed by A resulting in the disciplinary file being closed with no further action ('NFA') pending the decision of the court in respect of the criminal charge. Thereafter, upon receiving the report from the Magistrate's Court, Pontian, the Chief Police Officer ('CPO') of Johor suspended A's service with effect from 21 August 2009 date of decision of the court - on the ground that A had been convicted by the court pursuant to s. 173, CPC. Then, A was informed by the 1st respondent that she had been dismissed from the police force with effect from the same date pursuant to s. 33(1) of the Regulations.

[22] The complaint of A with regard to this issue is that the 2nd respondent had failed to apply its mind to determine what was the appropriate penalty for A's alleged misconduct in accordance with the doctrine of proportionality. Further, that it had failed in its duty to act fairly, justly and reasonably as evident from its letter which even failed to specify which particular limb of reg. 33(l), whether (a), (b) or (c) was invoked to make the order. Among the Indian authorities referred to in *Tan Tek Seng (supra)* is *Ranjit Thakur v. Union of India*, AIR [1987] SC 2386 which held:

> ... Judicial review generally speaking, is not directed against a decision, but is directed against the 'decision making process'. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review ...

[23] A was in essence relying on the reasonableness principle now commonly known as the '*Wednesbury* tests' propounded in the celebrated case of *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223. The principle is explained thus:

> In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power.

[24] By imposing the most severe imprisonment without considering a lesser punishment, it was submitted that the 2nd respondent ('R2') had acted arbitrarily and unfairly in imposing a punishment that was disproportionate to the alleged misconduct. There was no doubt from the record that R2 had imposed the punishment purely on the basis of the decision of the Magistrate's Court as a matter of course without considering any other relevant facts. Regulation 33(l) requires that before forming its opinion on the appropriate punishment, the disciplinary authority is required to consider the report forwarded to it under reg. 29(2), the records of service and the Head of Department's recommendation. There was no record of R2 having considered any of these.

[25] Whilst it may be true that R2 may have acted unreasonably in not having taken into account important factors like A's antecedents, record of service, background, etc., the question was whether it was sufficient for the court holding a judicial review to interfere with the decision by considering whether the decision itself was fair and reasonable.

[26] The learned SFC, contented that in performing the above role the court is not entitled to question whether the punishment imposed was too severe or too lenient. He referred to the Court of Appeal case of *T Ganeswaran v. Suruhanjaya Polis Diraja Malaysia & Satu Lagi* [2005] 3 CLJ 302 which adopted the principles enunciated by the House of Lords in *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141 as follows:

> Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and, therefore, the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable.

A Judicial review is concerned, not with the decision, but with the decision-making process. Unless the restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power.

B He also argued that the principle of proportionality of punishment in the majority judgment of the Court of Appeal in *Tan Tek Seng (supra)* had been over ruled by the Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 where Peh Swee Chin, FCJ said:

C After the High Court had judicially reviewed and upheld the disciplinary authority's finding of misconduct or breach of any provision of the code of conduct under the General Orders, in regard to any further and consequential order of punishment or penalty as prescribed by the General Orders and imposed on the D public officer in question, the High Court was right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order. The Court of Appeal was also right for not interfering with such order. The Court of Appeal was also right for not interfering with the same for E reasons which we will discuss as follows.

...

To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should F not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorized under art 132 of the Federal Constitution are in fact employees.

...

G

It cannot be denied further that the disciplining of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even H though the Judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.

I Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government, is the best person to judge similarly the seriousness of misconduct of an employee.

Reference was also made to *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 where the Federal Court held, *inter alia*:

> ... courts ought not to review the reasoning of the administrative body, with view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of the power on the part of the courts.

[27] Applying the above principles to the present facts, I held that the court could not substitute its own decision for the substantive findings of R2 on the merits on the grounds of unreasonableness or unfairness. The decision of R2 may involve underlying policy considerations not known to the court. In the circumstances, the question of proportionality or excessiveness of the penalty would not arise. Hence, my answer to the second issue is in the negative.

Decision

[28] In view of my decision on the first issue, I granted the order of *certiorari* sought for by the applicant to quash the order of dismissal by the disciplinary authority and the consequential orders with interest at 4% per annum until realisation and costs to the applicant to be taxed.